IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*	FINAL BRIEF ON BEHALF OF APPELLEE
v.	
	Crim. App. Dkt. No. 20140939
Specialist (E-4) **CHRISTOPHER B. HUKILL,** United States Army, *Appellant*	USCA Dkt. No. 17-0003/AR

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Index

Table of Authorities

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

Issue Presented

WHETHER, IN A COURT-MARTIAL TRIED BY MILITARY JUDGE ALONE, THE MILITARY JUDGE ABUSED HIS DISCRETION BY GRANTING THE GOVERNMENT'S MOTION TO USE THE CHARGED SEXUAL MISCONDUCT FOR MILITARY RULE OF EVIDENCE 413 PURPOSES TO PROVE PROPENSITY TO COMMIT THE CHARGED SEXUAL MISCONDUCT.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals [hereinafter the Army Court] reviewed this case pursuant to Article 66, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 866 (2015). This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2015).

Statement of the Case

A military judge sitting as a general court-martial convicted Specialist (SPC) Christopher B. Hukill [hereinafter appellant], contrary to his pleas, of rape and abusive sexual contact in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920 (2012) [hereinafter UCMJ]. The military judge sentenced appellant to reduction to the grade of E-1, total forfeitures, confinement for seven years, and a dishonorable discharge. The convening authority subsequently approved the sentence as adjudged.

On August 9, 2016, the Army Court affirmed the findings and sentence as approved. On August 16, 2016, the Army Court granted a motion for reconsideration and again affirmed the findings and sentence. On October 4, 2016, appellant petitioned this Court for grant of review. On November 23, 2016, this Court granted review in this case.

Statement of Facts

I. Appellant's Crimes

Appellant's convictions arise from his separate sexual assaults of two different victims, HG and AB. Both victims had been recruited to help with a magazine called Southern Sweethearts that appellant and his friends were purportedly producing. (JA 18-19, 48). Prior to the assaults, both victims had separately come to know appellant as the fiancé of their friend, Ms. Chelsea Collier [hereinafter Chelsea]. (JA 19, 48).

On April 4, 2014, AB hosted a barbeque at her home, where appellant, Chelsea, and several other friends were in attendance. (JA 19). At one point, AB decided to go get more alcohol, and appellant volunteered to accompany her. (JA 19). After they went to the liquor store, appellant suggested they drop by his house to pick up more liquor and his pills "so he could get fucked up." (JA 20). Once they arrived at appellant's house, appellant told AB the alcohol could be found at the top of the refrigerator. (JA 21). As AB went to the refrigerator and reached for

the alcohol, appellant approached her from behind, grabbed her by the arms and pulled her to the ground. (JA 21). AB fell on her back and appellant got on top of her and, holding her down with his weight, tried to remove her clothes. (JA 21-22). AB tried to get appellant off of her, smacking him with her hands and kicking him. (JA 22). She also screamed at him continuously to get off. (JA 24). Despite her resistance, appellant continued to pull AB's pants down, then inserted his fingers inside her vagina as he moved his face down towards her private area. (JA 22-24). As appellant attempted to lick AB's vaginal area, AB was able to maneuver her leg up and kick him back; she then tried to get up while reaching for something from the counter that she could use as a weapon. (JA 24). AB managed to pull a knife out of a drawer, and wielding it, told appellant to "get the fuck away from me." (JA 25). At this point, appellant put his hands up and said, "Whoa, whoa, whoa, my bad." (JA 25). AB responded, "You're bad? Are you kidding me?" (JA 25). Appellant tried to apologize, but AB, still very upset, told him to leave her alone and to get in the back seat of the car so that she could drive them both back to the barbeque. (JA 28).

As several witnesses testified later at trial, AB was noticeably quieter and withdrawn when she returned to the party and appellant had some red marks on the left side of his face. (JA 29, 44-45, 103-04). However, AB did not tell anyone what happened that night because she was scared how they would react and "didn't

want to lose people around me." (JA 29-30). A few weeks later, AB finally approached Chelsea at a bar and told her what appellant had done. (JA 32). The two walked up to appellant and AB said, "Tell her how you raped me." (JA 33, 107). Appellant admitted to the incident, stating, "It was my bad. I made a mistake." (JA 33, 107). In response, Chelsea started crying, and AB slapped appellant across the face and walked away. (JA 33, 107).

A few days later, on or about April 20, 2014, HG was at Chelsea and appellant's house. (JA 49). The three of them went to the bar where Chelsea worked; eventually, other friends later joined them at the bar. (JA 49). During the evening, HG had approximately 26-27 shots of tequila, which were purchased for her by appellant and her other friends. (JA 50-51, 110-11). As the evening went on, HG felt "intoxicated," but was still able to dance and carry on a conversation and "remember[ed] almost everything pretty vividly." (JA 51-52). Around 0200, appellant told HG she was too drunk and he needed to take her home. (JA 54). HG did not want to leave, but appellant told her she did not have a choice and picked her up and carried her until she agreed to walk with him to his car. (JA 54-56). During the car ride to appellant's house, they pulled over at least five times because HG was sick. (JA 56).

When they arrived at appellant's house, HG went straight to the bathroom to urinate. (JA 57). Appellant followed HG into the bathroom and told her she

needed to take a bath. (JA 58). HG disagreed, insisting she just wanted to go to bed, but appellant began to take HG's clothes off, which she unsuccessfully tried to fight. (JA 58). Despite HG's repeated protests for him to stop, appellant removed her clothes then picked her up and put her in the bath tub. (JA 58-59). Once in the tub, appellant held her down by the shoulder, turned on the water, and began to "wash" her with a washcloth. (JA 59). HG threw up in the bath tub, which appellant ignored as he continued to wash her in her "own throw-up water," touching her back and underneath her breasts area. (JA 59). When appellant touched her nipples, HG pulled her knees up and told him again to stop, that she was fine and just wanted to get out. (JA 59). Appellant then moved the wash rag down under her right thigh and started rubbing her vaginal area, as HG continued to tell him to stop and that she wanted to get out. (JA 59-60). Finally, appellant got up and walked out of the bathroom, after which HG drained the tub and turned on the hot water to rinse the vomit from her body. (JA 60).

Appellant returned, told her to get out, then used a towel to wipe her chest, butt, and between her legs, which HG tried to stop by keeping her legs closed. (JA 60). HG then walked into the hallway where appellant pushed her back against the wall. (JA 61). HG tried to push him off, but she did not have the strength to push him away. (JA 62). Appellant pulled underwear on her, grazing her vagina as he did. (JA 62). HG then went to her room, put on a T-shirt and curled up into a ball

towards the wall. (JA 62). Appellant picked her up and put her on the bed, then joined her, when HG told him she was about to throw up. (JA 63). Appellant grabbed a trashcan into which she vomited. (JA 63). He then put a blanket on her and, as she tried to fall asleep, started to rub her back, butt, and between her legs. (JA 63). Each time appellant touched her, HG would wake up, pull his hands off, and tell him to stop and leave her alone. (JA 63). After HG fell asleep again, appellant reached between her legs from behind and started rubbing her clitoris and the inner side of her vagina under her underwear; HG responded by grabbing his hand and flinging it across the bed. (JA 65-66). Appellant eventually got up and walked away. (JA 66).

The next morning, HG went home and told her boyfriend, who advised her to report it. (JA 66). A week later, HG decided also to tell Chelsea before she reported to law enforcement, because Chelsea was one of her best friends and she was concerned with how the report would impact her. (JA 66, 113). Chelsea immediately confronted appellant over text, who admitted that it was true. (JA 66). Chelsea moved out that night and agreed to accompany HG in her report to the police. (JA 66-67).

II. M.R.E. 413 Motion

On 15 October 2014, after arraignment and prior to trial, the government filed a motion "to introduce evidence under Military Rule of Evidence (M.R.E)

413)." (JA 137). On 17 October 2014, the defense filed its response in opposition. (JA 144-51). On 20 October 2014, the military judge issued a written ruling that granted the government's motion, stating, *inter alia*:

> The Defense asserts that it is improper under MRE 413 to permit charged sexual offenses to serve propensity evidence for each other. In support of this conclusion they primarily cite two cases, *United States v. Myers*, 51 M.J. 570 (N.M.C.C.A. 1999) and *United States v. Dacosta*, 63 M.J. 575 (A.C.C.A. 2006).
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> The *Myers* decision was one of the first military appellate courts to deal with this issue. However, *Myers* faced the issue of charged offenses under circumstances where the military judge had failed to provide even a standard spillover instruction. Under those facts the Court in Myers found that the military judge had committed reversible error. Therefore, the *Myers* language cited by the Defense is dicta. Unlike in *Myers*, the *Dacosta* decision did not deal with the question of using charged offenses under MRE 413 and the language cited from that case is likewise dicta and not particularly helpful in deciding this issue.
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> The legislative history cited in *Myers* is arguably the Defense's most persuasive argument that charged offense should not be used as MRE 413 propensity evidence. However, the Court does not need to examine this legislative history as the plain language of MRE 413 leads to an opposite result. There is simply nothing vague or unclear in the words "committed any other sexual offense."
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> . . .
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> The drafters of MRE 413 could have easily chosen to modify the phrase "committed any other sexual offense" by adding "prior sexual offense" and/or "uncharged sexual offense" but did not.

> Despite the concern voiced by the *Myers* Court, in view of the Court of Appeals for the Armed Forces decision in *Burton*, this Court finds no constitutional violation in using charged offenses that have been properly evaluated using the definitions set forth in MRE 413 and the factors set forth in Wright.

(Supp JA 4). The military judge proceeded to lay out his M.R.E. 403 analysis applying the *Wright* factors. (Supp JA 5-6). He also concluded

> The Court will give an appropriately tailored limiting instruction to the members that they may properly consider this evidence under MRE 413 for its bearing on the accused's propensity to commit the charged sexual assaults. The instruction will highlight that the introduction of such evidence does not relieve the government of its burden of proving every element of every offense charged, and that the fact-finder may not convict the accused of the charged offenses on the basis of the evidence admitted under MRE 413. This instruction will be in addition to the standard "Spillover Instruction."

(Supp JA 6). The military judge never gave this instruction at trial, as Appellant eventually elected to be tried by judge alone.

Summary of the Argument

The military judge did not err in his M.R.E. 413 ruling because evidence of charged conduct under M.R.E. 413 is neither statutorily nor constitutionally barred when subject to the proper analysis. The instructions in Hills, which this Court found undermined the presumption of innocence, are not at issue in this judge-alone case, and any error in granting the evidentiary motion was harmless.

Standard of Review

A military judge's decision to admit evidence is reviewed for an abuse of discretion. *United States v. Solomon*, 72 M.J. 176, 179 (C.A.A.F. 2013). The meaning and scope of M.R.E. 413 is a question of law reviewed de novo. *United States v. Hills*, 75 M.J. 350, 354 (C.A.A.F. 2016) (citation omitted).

Argument

Military Rule of Evidence [hereinafter M.R.E.] 413 states, "In a court-martial proceeding for a sexual offense, the military judge may admit evidence that the accused committed any other sexual offense. The evidence may be considered on any matter to which it is relevant." Mil. R. Evid. 413(a) (2013). Before admitting evidence under M.R.E. 413, three threshold findings are required: (1) the accused is charged with an offense of sexual assault, (2) the evidence proffered is evidence of the accused's commission of another offense of sexual assault, and (3) the evidence is relevant under Rules 401 and 402. *United States v. Wright*, 53 M.J. 476 (C.A.A.F. 2000). In addition, the military judge must conduct a balancing test under M.R.E. 403, examining a range of factors,[1] prior to the admission and use of

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[1] These factors include: strength of proof of the prior act, probative weight of evidence, potential for less prejudicial evidence, distraction of factfinder, time needed for proof of prior conduct, temporal proximity, frequency of the acts, presence or lack of intervening circumstances, and relationship between the parties.

evidence under M.R.E. 413. *Id.* These rules, in addition to other safeguards built into Rule 413 such as the notice requirement, "protect the accused from unconstitutional application of M.R.E. 413 . . . ." *United States v. Schroder*, 65 M.J. 49, 55 (C.A.A.F. 2007); *see also United States v. Enjady*, 134 F.3d 1427, 1433 (10th Cir. 1998) ("Considering the safeguards of Rule 403, we conclude that Rule 413 is not unconstitutional on its face as a violation of the Due Process Clause.").

In *United States v. Hills*, this Court rejected an application of M.R.E. 413 "as a mechanism for admitting evidence of charged conduct . . . in order to show propensity to commit the very same charged conduct." 75 M.J. 350, 354 (C.A.A.F. 2016). In doing so, it identified two issues with the use of M.R.E. 413 in *Hills*: one statutory ("Neither the text of M.R.E. 413 nor the legislative history of its federal counterpart suggests that the rule was intended to permit the government to show propensity by relying on the very acts the government needs to prove beyond a reasonable doubt in the same case."), the other constitutional (". . . the instructions that the military judge provided both undermined the presumption of innocence and created a tangible risk that Appellant was convicted based on evidence that did not establish his guilt beyond a reasonable doubt."). *Id.*

While the Court was correct in its decision with respect to *Hills*, it should clarify that its opinion does not establish a blanket prohibition on the use of all

charged misconduct under M.R.E. 413. Rather the impermissible use of evidence of charged conduct for propensity--such as occurred in *Hills*--is already appropriately barred by the numerous tests built into the rule, especially the M.R.E. 403 balancing test. This Court, by clarifying this point, would resolve the potential dissonance in *Hills* with the plain language of the rule and this Court's own precedent. *See United States v. Guardardo*, 75 M.J. 889, 896 (Army Ct. Crim. App. 2016) ("we find some dissonance no matter how we interpret *Hills*").

I. This Court should clarify that *Hills* does not establish a *per se* prohibition on the use of charged misconduct for M.R.E. 413 purposes.

There is nothing in the plain language of the rule that bars the application of M.R.E. 413 to evidence of "any other sexual offense" simply because it is charged. To the extent that *Hills* suggests otherwise, this Court should limit and clarify that proposition. In determining that M.R.E. 413 is primarily intended for the admission of evidence of uncharged conduct in *Hills*, this Court looked to the structure of the rule, its relationship to M.R.E. 404(b), and the legislative history of the federal rule. However, simply because Congress intended to apply Rule 413 primarily to evidence of uncharged misconduct does not automatically mean it intended to bar its application to charged misconduct. Rather, the plain language of the rule should control, and in this case, the rule is unambiguous in allowing its application to "evidence that the accused committed *any other sexual offense*." Mil. R. Evid. 413.

The text of M.R.E. 413 demonstrates that there are two aspects to the rule: (1) the admissibility of certain evidence, and (2) the use or consideration of that evidence.[2] When it comes to evidence of charged misconduct, the first part of the rule is inherently moot because evidence of charged misconduct is already admissible. However, the second part of the rule, governing how the admitted evidence may be used, is still applicable to evidence of charged misconduct. In other words, once evidence of any other sexual misconduct is admitted--whether it

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[2] Evidentiary rules can govern what evidence is admissible, how it may be used, or both. For instance,

> Rule 404(b) bans the *use* of prior bad acts to show action in conformity with the past behavior. *The rule bans not the evidence, but the propensity inference.* It also says that other inferences that might be drawn from prior bad acts, such as intent or motive, are permissible. Rule 404(b) neither creates any presumption nor tells a court what to do when prior-act evidence gives rise to both a propensity inference and an intent inference. The rule instead identifies which inferences are improper and which are proper. It is Rule 403--not Rule 404--that gives a court discretion to exclude prior-act evidence if the danger of the improper inferences substantially outweighs the probity of the proper ones. Rule 404(b) is thus nothing more than a rule that bars one particular inference from prior-act evidence; it is Rule 403 that gives a court discretion to exclude evidence that is problematic because it will be difficult to confine it to proper bounds, because of "the danger of unfair prejudice, confusion of the issues, or misleading the jury," or similar concerns.

United States v. Rogers, 587 F.3d 816, 822 (7th Cir. 2009). Just as Rule 403 protects against "the danger of unfair prejudice, confusion of the issues, or misleading the jury" from inferences made under Rule 404(b)

is evidence of charged or uncharged conduct--M.R.E. 413 allows an inference to be drawn "for its bearing on any matter for which it is relevant" so long as it survives a proper balancing test under M.R.E. 403. The same M.R.E. 403 analysis that protects against the improper admissibility of evidence also protects against improper inferences to be drawn from that evidence. *See United States v. Rogers*, 587 F.3d 816, 824 (Cudahy, J., concurring) (7th Cir. 2009) ("This Court today and others previously have broadly accepted Rule 403 as a necessary bulwark against *improper inferences* to be drawn from evidence admitted through Rules 413-415.").

In some cases, the propensity inference to be drawn from the evidence of charged misconduct would not survive a proper balancing test. *Hills* provides a prime example, where appellant was charged with three specifications involving the same victim on the same night within a couple-hour period. It is illogical to imagine how evidence of essentially one sexual assault against one victim in one night would show a *propensity* to commit sexual assault. Thus, the misconduct in *Hills* proffered under M.R.E. 413 should have never survived the threshold M.R.E. 401/402 analysis; and even if a propensity inference was in some way minimally probative, it should have never survived the M.R.E. 403 balancing test.

In other cases involving multiple sexual offenses that are factually distinct, allowing a propensity inference to be drawn from the charged misconduct is

permitted by the rule and in fact has been sustained by both this Court and others. *See Schroder*, 65 M.J. 49 (C.A.A.F. 2007) (finding harmless instructional error, but not because the military judge allowed a propensity inference to be made from the charged conduct); *United States v. Burton*, 67 M.J. 150, 152 (C.A.A.F. 2009) (finding improper argument, not because propensity was argued based on charged offenses, but because the government "may not introduce similarities between a charged offense and prior conduct, whether charged or uncharged, to show modus operandi or propensity without using a specific exception within our rules of evidence, such as Mil. R. Evid. 404 or 413."); *United States v. Rivera*, 546 F.3d 245, 254 (2d Cir. 2008) (finding joinder proper because Fed. R. Evid. 414 allows evidence from one charged offense to be used to prove another charged offense); *United States v. Seymour*, 468 F.3d 378 (6th Cir. 2006) (finding that a victim's testimony as to one charged offense, combined with the testimony of unrelated victims as to other sexual offenses (both charged and uncharged), was sufficient to establish guilt). In this case, where the military judge conducted a thorough MRE 403 analysis utilizing the *Wright* framework, it was not error to allow a propensity inference to be drawn from the charged misconduct.

II. This Court should also clarify that drawing a propensity inference from evidence of charged misconduct, when subject to the proper balancing analysis, is not constitutionally barred.

In addition to finding error based on a statutory analysis of the rule, this Court also found that the instructions in *Hills* "violated Appellant's presumption of innocence and right to have all findings made clearly beyond a reasonable doubt, resulting in constitutional error." 75 M.J. at 356. In reaching its conclusion, this Court reasoned, "It is antithetical to the presumption of innocence to suggest that conduct of which an accused is presumed innocent may be used to show a propensity to have committed other conduct of which he is presumed innocent. The fact that no presumption of innocence attaches to uncharged conduct is why the use of charged conduct as propensity evidence is analytically distinct from uncharged conduct." *Id.* at 356 and n. 3.

This statement however appears to draw a mechanical distinction within the rule without a true difference. The presumption of innocence "is an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law created." *Coffin v. United States*, 156 U.S. 432, 453 (1894). The "doctrine of reasonable doubt" is the "effect" or "resultant" of the "principle of the presumption of innocence," *id.* at 459, and "provides concrete substance for the presumption of innocence . . . ." *In re Winship*, 397 U.S. 358, 365 (1970). When an accused is

presumed innocent of a charge, it follows that the government must prove every element of that charge beyond a reasonable doubt. It does *not* necessarily mean that the evidence of the charged misconduct is wholly insulated from any inferences that may be properly drawn from it.

Under M.R.E. 413, drawing a propensity inference from "evidence that the accused has committed any other sexual offense" has been repeatedly upheld as constitutional, when "subject to the M.R.E. 403 balancing test and proper instructions." *Hills*, 75 M.J. at 354. Whether this "other sexual offense" is charged or uncharged is not, in itself, what might undermine the presumption of innocence. Rather, what presents the risk of undermining the presumption of innocence is that the propensity inference, once drawn, might lead the jury to give it undue weight and convict based on propensity alone or anything less than evidence beyond a reasonable doubt. However, this same concern exists whether or not the misconduct used to draw the propensity inference is charged or uncharged.[3] In the same vein, this same risk is adequately avoided--whether the

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[3] To further illustrate this, consider a hypothetical case similar to this one, where there is evidence that the accused committed two sexual assaults (labeled SA-1 and SA-2). SA-1 is uncharged and SA-2 is charged. Under M.R.E. 413, evidence of SA-1 can be used to show the accused's propensity to commit sexual assaults, which in turn, can be used to support an inference of guilt for SA-2. There is essentially a two-part inference drawn here to make evidence of SA-1 relevant to helping prove SA-2, and thus potentially admissible under M.R.E. 413. The first "sub-inference"

evidence is of charged or uncharged misconduct--when the safeguards built into the rule are correctly applied and proper instructions are given to ensure the panel convicts only on proof beyond a reasonable doubt.

In a case such as *Hills*, where "none of the offenses were factually independent of each other," the use of each offense to prove the next "created the potential for circular findings of proof; a possible triple helix of evidence where the evidence of guilt of each offense helps establish the next, spiraling upward until the threshold of reasonable doubt is crossed." *Guardardo*, 75 M.J. at 894. Based on this risk, this Court was correct in finding error in both the use of the charged evidence in *Hills* under M.R.E. 413, as well as its accompanying instructions. However, where the offenses are factually distinct, M.R.E. 413 allows a propensity inference to be drawn, without regard to whether the offense happens to be on the charge sheet or not. It is the M.R.E. 403 balancing test that ensures the inference of propensity does not erode the presumption of innocence. Thus, to any extent that *Hills* might lead to a contrary conclusion, this Court should clarify that the use of evidence of charged sexual offenses that are factually distinct from each other

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(SA-1 to show propensity) is permitted under M.R.E. 413 and does not, in itself, present a constitutional issue. Rather, it is the second "sub-inference" (propensity to prove SA-2) that presents the risk or danger of unfair prejudice--that the accused might be convicted based on something other than evidence beyond a reasonable doubt. This risk does not necessarily, or impermissibly, increase by mere virtue of *charging* SA-1. The court must, of course, still weigh this risk against the probative value of the inference.

under M.R.E. 413 does not implicate the "fundamental conceptions of justice" under the Due Process Clause, when subject to the proper balancing analysis and other safeguards provided by the rule.

III. The instructions in *Hills*, which this Court found undermined the presumption of innocence, are not at issue in this judge-alone case, and any error was harmless.

In *Hills*, this Court found constitutional error with the "muddled accompanying instructions" that "invited the members to bootstrap their ultimate determination of the accused's guilt with respect to one offense using the preponderance of the evidence burden of proof with respect to another offense." 75 M.J. at 357. This Court suggested that a proper instruction, such as that given in *People v. Villatoro*, 54 Cal. 4th 1152, 144 Cal. Rptr. 3d 401, 281 P.3d 390, 400 (Cal. 2012),[4] can adequately protect against this risk.

In this case however, the military judge never gave an M.R.E. 413 instruction, but only contemplated giving one if the appellant opted for a panel trial. The military judge granted the government's motion for the express purpose

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[4] This Court stated that "the California Supreme Court did not consider the issue of the accused's right to be presumed innocent of all charges," even though this issue was implicitly raised at length in the concurring and dissenting opinion and also addressed by the majority. *See People v. Villatoro*, 54 Cal. 4th at 1165 (citations omitted) (emphasis added) ("In cautioning against the 'bootstrapping of verdicts' . . . and the possibility that the jury may 'simply conclude that because it found the defendant guilty of one count, he must be guilty of the others' . . . the concurring and dissenting opinion *merely identifies the general concern against allowing a jury to consider propensity evidence in a criminal case.*").

of providing "an appropriately tailored limiting instruction to the members that they may properly consider this evidence under MRE 413 for its bearing on the accused's propensity to commit the charged sexual assaults." (Supp JA 6). This issue became moot when appellant elected trial by judge alone. At that point, no instruction was necessary and none was given.

Thus, the instructional error as occurred in *Hills* is not at issue here. As explained above, the military judge's potential *use* of charged evidence for an M.R.E. 413 purpose is neither statutorily nor constitutionally barred, subject to the balancing test and other procedural safeguards. Here, the military judge's detailed written ruling on the M.R.E. 413 issue demonstrates he carefully considered the defense's arguments, to include its constitutional challenge, and conducted a thorough analysis under *Wright* to ensure the proper use of the evidence.

However, if this Court finds that the military judge's granting of the M.R.E. 413 was erroneous, such error was nonconstitutional in nature and harmless. "Military judges are presumed to know the law and follow it absent clear evidence to the contrary." *United States v. Rodriguez*, 60 M.J. 87, 90 (C.A.A.F.) (citing *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997)). There is no evidence from the record to rebut the presumption that the military judge properly understood the presumption of innocence in appellant's case and held the government to its burden of proof beyond a reasonable doubt.

Appellant's reference to the Benchbook instructions "in circulation at the time of trial" is misplaced and invites only unwarranted speculation, as there is nothing in the record to indicate that the military judge referred to the Benchbook instructions, particularly when he did not need to provide instructions at all. In fact, the proposed instructions proffered by the military judge in his pretrial ruling are different from the ones in the Benchbook in that they make no mention of the "preponderance of evidence" standard. *Compare* (Supp JA 6) with Dept' of Army, Pam. 27-9, Military Judges' Benchbook, para. 7-13-1, n. 4.2 (Sep. 2014). Rather, the military judge emphasizes in his pretrial ruling that, "The instruction will highlight that the introduction of such evidence does not relieve the government of its burden of proving every element of every offense charged, and that the fact-finder may not convict the accused of the charged offenses on the basis of the evidence admitted under MRE 413 alone." (Supp JA 6).

Furthermore, each of appellant's convictions were supported by independent, strong and credible evidence from the testimonies of the victims, which were corroborated by several third-party witnesses, as well as appellant's own admissions to Chelsea and his sworn statement to CID. In light of the above, this Court can be confident that the military judge's M.R.E. 413 ruling, if error, was harmless.

Conclusion

WHEREFORE, the Government prays this Honorable Court affirm the Army Court's decision and the findings and sentence in this case.

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on February 6, 2017.

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